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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. STANFORD CECIL JACKSON et al., Defendants and Appellants.	B199624 (Los Angeles County Super. Ct. No. NA072283)

APPEAL from a judgment of the Superior Court of Los Angeles County. Tomson T. Ong, Judge. Affirmed in part; reversed in part and remanded with directions.

Cynthia L. Barnes, under appointment by the Court of Appeal, for Defendant and Appellant Stanford Cecil Jackson.

Patrick Morgan Ford, under appointment by the Court of Appeal, for Defendant and Appellant Joshua Kemonie Greer-Warren.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and Roy C. Preminger, Deputy Attorneys General for Plaintiff and Respondent.

Appellants Stanford Cecil Jackson and Joshua Kemonie Greer-Warren, who are brothers, were convicted of participating in two armed robberies and one attempted armed robbery, with related assault and weapons charges. The crimes occurred in Long Beach on the evening of November 5, 2006. Appellants were 19 and 20 years old, respectively, on that date, and had little or no prior criminal history. Jackson was sentenced to 29 years four months in prison. Greer-Warren was sentenced to prison for 19 years eight months.

On appeal, Jackson contends that the trial court erred in denying his motion to substitute counsel under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). Appellants both argue that the trial court erred when it found that their confessions were voluntary, at a pretrial hearing under Evidence Code section 402. Appellants also raise several sentencing issues, some of which respondent concedes.

At our request the parties have provided supplemental briefing on these issues: (1) Did the trial court's preconceived belief that it was "impossible" that a police detective would promise probation in return for a defendant's statement result in a fundamentally unfair hearing on the voluntariness of the confessions? (2) At the sentencing hearing, did the trial court improperly use the defendants' lack of prior record or insignificant prior record as a circumstance in aggravation, when that fact should have been used as a circumstance in mitigation?

We reverse some of the counts based on prejudicial error at the Evidence Code section 402 hearing, affirm some of the counts, and remand for additional proceedings.

FACTS

1. Prosecution Evidence

A. The First Incident

Around 10:00 p.m. on November 5, 2006, Juvenal B. was sitting on the stairs of an apartment building when he was approached by two Black males. One of the men held a handgun; the other held a folding knife. The gunman sat down next to Juvenal, held the gun at his stomach, and ordered him to give up his wallet. Juvenal said he had no wallet. The gunman put his hand into Juvenal's pocket and removed around $300. Juvenal

started to get up, intending to flee. The man with the knife grabbed Juvenal's jacket, pulled him back, and held the knife near the jacket. The men then left with Juvenal's money. The entire incident lasted no more than two minutes.

At the trial, Juvenal testified that neither Greer-Warren nor Jackson were the people who robbed him.

B. The Second Incident

Around 10:15 p.m. that same night, Fabian D. parked his vehicle near the tennis courts of a park. When he got out, a silver Nissan Murano vehicle (the Nissan) pulled up near him. A man got out of the front passenger's seat of the Nissan, holding a handgun. The gunman approached Fabian, pointed the gun at his stomach, and demanded money. A second man left the driver's seat of the Nissan and approached Fabian. A third man exited the Nissan, walked up to Fabian, and removed the wallet from Fabian's pants. The second man yanked off the chain that Fabian was wearing. One of the men hit Fabian in the lip, causing a cut that bled and later led to swelling. The men returned to the Nissan and drove away with Fabian's wallet and chain. The wallet held approximately $150, identification, a credit card, and other papers.

When the police showed him photo lineups (six-packs) that contained appellants' pictures, Fabian did not pick out Greer-Warren, but he identified Jackson as the gunman. At the trial, Fabian identified Jackson as the gunman and Greer-Warren as the driver, the person who took his chain.

C. The Third Incident

About 10:45 p.m. on November 5, 2006, David K. got out of his car and locked the door. When he turned around, he noticed that a man was walking toward him. The man pulled out a handgun, pointed it at David's stomach, and ordered him to hand over his wallet and cell phone. The gunman motioned to a person who was behind David and told that person to take David's property. David started to run away. The gunman said, "Trip him, trip him, take his cell phone and his wallet, I don't want to have to shoot him." David saw the Nissan nearby and ran to it, hoping that the person inside might help him. He put his hands on the Nissan near the driver's side and shouted for help. The driver did

not respond. The two men who had approached David ran up to him. One of them tried to remove David's wallet but did not succeed. The gunman scuffled with David and struck him in the back of the head with an object. David did not know what the object was, but it felt harder than a fist, and his head felt sore for a few days. The men left in the Nissan without taking any of David's property.

At the trial, David identified Jackson as the gunman at the trial, repeating the identification he made when shown the six-pack. He never identified Greer-Warren.

D. The Investigation

Detective Donald Collier began the investigation the morning after the crimes. The police reports included a description of the Nissan. Later that day, officers saw that vehicle parked outside a house, near the location of two of the incidents. Officers saw Jackson and Greer-Warren enter the car and ride in it. Greer-Warren was driving, and Jackson was in the rear seat. They were arrested. Jackson had "a lock-blade knife" in his belt. The officers obtained a search warrant for the residence and entered it, using a key taken from Greer-Warren. Inside of a bedroom, they found a handgun, Greer-Warren's Social Security card, and a student identification card for the National Institute of Technology, with Jackson's name on it.

E. The Confessions

Detective David Foltz and his partner, Detective Dugan, separately interviewed appellants following their arrest. Jackson was interviewed first. Before appellants were questioned, they both read aloud and signed forms that advised them of their rights. Foltz took notes but did not videotape or audiotape the interviews.[1] Appellants reviewed

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[1] In response to questions during cross-examination, Detective Foltz gave this explanation of why the interview with Jackson was not recorded:

"Q Did you tape-record or audibly record that interview in any way?

"A No.

"Q And you do have -- you can do that if you so desire; is that correct?

"A I don't have a tape-recorder, but I probably could turn one up.

Foltz's notes, initialed each line, and signed them. They also wrote letters of apology to the victims.

During the People's case-in-chief, the jury heard edited versions of the confessions that omitted what each brother said about the other's participation. Jackson told Detective Foltz that he walked up to a drunk Hispanic man who tried to run up some stairs and got $14 to $16 from the man. The second robbery involved another "drunk Mexican" near a park. When that man got out of a car, Jackson walked up to him with the gun and got $20 from the man. The third robbery victim was a White male, between 28 and 40 years old. Jackson walked up to that man with the gun as the man left his car. Jackson held a gun at that man's stomach and told him to empty his pockets. The man ran toward the Nissan and leaned on it, seeking help.

Greer-Warren told Detective Foltz that during the first incident, he sat down next to a man and demanded money, holding a gun in one hand and the man's shirt in his other hand. He obtained $10 to $20 from that man. For the second robbery, Greer-Warren said he approached a Hispanic man near a park and got $50 to $60 from him. For the third robbery, Greer-Warren said he was driving the Nissan, the man started yelling, and no money was obtained.

2. Defense Evidence

Jackson testified that he did not commit the crimes and was at Greer-Warren's apartment at that time. When Detective Foltz interviewed him, Foltz said the victims had described him, and he would be given probation if he made a statement. Jackson was

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"Q A lot of detectives use tape-recorders when they interview suspects; is that correct?

"A Some do, some don't.

"Q And also videotape interviews?

"A I'm not aware of anybody at our department using videotape.

"Q But the tape-recorder is quite common, correct?

"A I don't know how common it is, but it's used."

frightened, hungry, and tired, and he needed to use the restroom. He kept professing his innocence and asking to be left alone. Foltz told him they were not leaving the interview room until he confessed. Foltz kept describing what happened. Jackson kept denying it. Finally, Jackson initialed and signed the paper that described what happened, and wrote the letter of apology, so that Foltz would let him leave.

Greer-Warren testified that he had never been arrested before. He resided in the apartment where the gun was found but was not involved in the robberies. On the day of his arrest, he borrowed the Nissan from his friend, Jesus Cazares, to drive to a clothing store. He had borrowed that vehicle before. When Detective Foltz interviewed him, Foltz said that Jackson had already implicated him, people had described his clothing, and he would not be allowed to leave the interview room until he said what Foltz wanted to hear. Foltz wrote out the description of the incident and promised to recommend probation if Greer-Warren admitted the crimes. Greer-Warren told Foltz that he was thirsty and needed to use the restroom. Foltz would not let him leave until he signed the statement and wrote the letter of apology.

Appellants' grandmother testified as a defense character witness. She took over raising appellants when Greer-Warren was around 16, but "booted" them out about four years later because it was time for them to live on their own. They both were honest and well-behaved and excelled in their academic studies. She herself did not believe they could commit robberies. Greer-Warren was a 4.0 student at school.

3. Prosecution Rebuttal Testimony

Detective Foltz testified that he made no promises or threats when he interviewed appellants. He advised them of their rights, told them what the victims had said, and asked them to tell their stories. They then spoke freely to him.

Detective Foltz read aloud to the jury his extremely detailed notes about the confessions, which appellants signed. Basically, appellants said that Jackson went to visit Greer-Warren, and a friend of theirs named "Jesse" showed up. A discussion ensued about making money by committing robberies. Jesse offered the use of his gun and vehicle. They drove with Jesse to his house and got the gun, but Jesse was not with them

during the crimes. Appellants committed the first robbery on foot, by walking up to a Hispanic man on a staircase. Greer-Warren was the gunman on that one. They then borrowed Jesse's Nissan, picked up a friend of Greer-Warren's, and drove around looking for people to rob. Jackson was the gunman, Greer-Warren was the driver, and Greer-Warren's friend was the third participant during the robbery of the Hispanic man in the park and the attempted robbery of the man who ran up to the Nissan, yelling for help.

DISCUSSION

1. Substitution of Counsel

Prior to trial, Jackson filed a written motion to substitute his court-appointed attorney, under *Marsden*, *supra*, 2 Cal.3d 118. The motion maintained that counsel had not conducted adequate cross-examination at the preliminary hearing, had not filed motions that should have been filed, and had failed to contact defense witnesses. Those witnesses were "Terry W[blank space], and his mother, of Compton, California 90222, and Johnae _____, also of Compton, California, who administered a tat[t]oo to defendant's right shoulder, who would have testified that defendant spent the entire [time] at her home . . . ."

The prosecutor left the courtroom while the trial court discussed the *Marsden* motion with appellant and his counsel. The court summarized Jackson's allegations and gave counsel a chance to respond. Counsel explained that he had represented Jackson for three or four months. Jackson had no record, but he gave a detailed confession to the police and had been identified by the victims. Counsel thought he had done everything that could be done. The court asked Jackson if he had anything else to say. He did not. The court then found there was no basis for substituting counsel.

We recently explained the applicable law in *People v. Clemons* (2008) 160 Cal.App.4th 1243. "Under *Marsden*, *supra*, 2 Cal.3d 118, a criminal defendant who seeks to substitute counsel must be allowed to state the specific reasons for his dissatisfaction with counsel. Once that opportunity is given, it is within the trial court's discretion whether the circumstances justify a substitution of counsel. Substitution is required if the record clearly shows that defense counsel is not providing adequate

representation or that there is such a conflict between the defendant and counsel that ineffective assistance of counsel is likely to result. The trial court's determination will not be disturbed on appeal absent a showing that denial of the motion substantially impaired the defendant's right to the effective assistance of counsel." (*Id*. at pp. 1250-1251.)

Jackson contends that the trial court denied him "an adequate and meaningful evaluation of the specifics" of his complaint that counsel failed to investigate and prepare the defense. He does not, however, specify what additional inquiry the court should have made. His contention lacks merit, as the trial court complied with the requirements of *Marsden*, and Jackson did not show that there were grounds for substituting counsel.

We note, in particular, that Jackson provided insufficient identifying information for the three witnesses he wanted contacted. Also, it does not appear that further investigation of witnesses in Compton would have provided an alibi for the time of the crimes, as the crimes were committed during the evening in Long Beach, Jackson told the police he got a tattoo in Compton earlier that day, and he testified that he was at Greer-Warren's home in Long Beach the entire evening the robberies occurred.

2. Voluntariness of the Confessions

A. The Record

Prior to the trial, appellants sought to exclude their confessions on the ground they were involuntary. An Evidence Code section 402 hearing ensued, at which Detective Foltz and appellants gave testimony that was very similar to what they later said at the trial regarding the confessions. Appellants contend that their statements were involuntary and should have been excluded.

At the hearing on the confessions, Detective Foltz testified that he and Detective Dugan interviewed Jackson and then Greer-Warren at the police station. Before the questioning began, Foltz had appellants read aloud and sign forms that advised them of their rights. No promises or threats were made. In particular, appellants were not promised that they would get probation if they cooperated. Jackson was interviewed first. Foltz told Greer-Warren that Jackson had made a statement that implicated both

brothers, but he did not read Jackson's statement to Greer-Warren. The interviews were not recorded, but Foltz took notes, and he had appellants initial each line of the notes. He also had them sign the notes and write letters of apology to the victims.

Jackson testified that Detective Foltz told him that, as he had no criminal record, he would be promised probation. Foltz also threatened him, by saying that a gun had been found, and Jackson and Greer-Warren would be accused of committing murders if Jackson did not confess to the robberies. Jackson had previously been "traumatized" by bad experiences with the police. He kept telling Foltz that he did not commit the robberies and would not plead guilty to them. Foltz kept repeating that the descriptions of Jackson, Greer-Warren, and the vehicle matched what the victims described. Finally, Jackson initialed and signed the statement that described the robbery incidents, as he was terrified of the police, feared he would be charged with murder, and thought he would get probation. He also signed the apology letter, after Foltz told him what to say.

Similarly, Greer-Warren testified that, even though he was innocent, he signed the statement Detective Foltz showed him, as Foltz promised to recommend probation. Greer-Warren denied that he himself initialed the statement and said he was advised of his rights after, rather than before he was interrogated. He wrote the letter of apology because Foltz said he had to do that, to qualify for probation. He did not rob anyone, and the statement he signed was not true.

After hearing argument from counsel, the court found that the statements were voluntary. It concluded that there was no coercion because Jackson's and Greer-Warren's testimony that they were promised probation was not credible, as the facts involved use of a gun, and neither the police nor the district attorney can promise probation in that type of case. The trial court found that it was "impossible" that the detectives would have promised probation.[2]

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[2] The court's exact words were:

"Let me go first with Mr. Jackson's motion. I don't find any coercion in this case. I'll explain the reason why. Because there is a gun involved in which he is alleged [*sic*],

B. Analysis

Unfortunately, there are three major flaws in the trial court's conclusion.

First, there is no support for the court's conclusion that it was "impossible" for Detective Foltz to have promised probation. If Foltz made such a promise to the two

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it's mandatory state prison. I find it an incredible comment that any detective would promise probation on a gun case because it's mandatory state prison. It's impossible to do that. So based on the credibility of the witnesses in this case, I find his comment about probation incredible.

"And based thereon, I also find his comment about pinning a murder charge on a case in which it's not even rip [*sic*]. Maybe he -- the gun is involved with murder, I don't know, but to the extent, in this particular case, I do not believe him one bit because there is -- a promise of probation is impossible in something like this. It is not something that a police officer nor even the district attorney can promise.

"The judge has to accept it. Only the judge sentences. And the judge makes the determination whether or not probation is appropriate or not. And I have not made that determination, but I know that in a gun case, if found to be true, that's mandatory state prison.

"I don't have any coercion on the situation involving Mr. Jackson. I find that the confession and admission [were] made knowingly, intelligently, voluntarily, expressly and implicitly, and that will be the law of the case.

"As to Mr. Greer-Warren, I find it incredible that he indicates a different M.O. [modus operandi] for the detectives in this case, that they advised his rights until after he has made the statement. [*Sic*.] Considering that his brother, who took the stand just a second ago, said that it happened before, and that they all of a sudden change the M.O., I find that comment incredible.

"I also find incredible the comment about promising probation because that's not something a detective would do nor a D.A. would do because that's what a judge can do, but given that there is a mandatory state prison with the gun, that is not a statement that would be made for a promise based on that because of the gun involved, and there is mandatory state prison in this case.

"Based thereon, I find based on the credibility of the witnesses that his comments are incredible; that I find that he made -- I find no coercion or promises, just like in Mr. Jackson's case. I find that the -- any statements that he made in this case [are] knowingly made, knowingly, intelligently, voluntarily, understandingly, expressly and explicitly.

"I don't find any defect as to the warnings. I don't find any defects as to the advisement of rights or the waivers thereto, and I don't find any defects as to the statements made based thereon. That will be the law of the case."

appellants, it would not be the first, nor the last, time that an interrogating officer made a misleading statement to a suspect in order to elicit a confession or admission. In fact, our Supreme Court recognized some time ago that promises made by one without authority to give the promised effect are nonetheless coercive "if they are made in the presence of one who has such authority under circumstances from which the accused has a right to assume that they were authorized." (*People v. Rogers* (1943) 22 Cal.2d 787, 805.) Both appellants could rightfully assume that, if the promises of probation were made, Foltz had the authority to make them. In short, there is no evidence that such a promise was "impossible."

Second, the finding that the promise of probation was "impossible" foreclosed a consideration of the evidence presented on the issue of voluntariness. The right to have a *fair* hearing and a *reliable* determination of the issue of voluntariness is of constitutional dimension. (*Jackson v. Denno* (1964) 378 U.S. 368, 376-377.) A trial judge must consider the evidence propounded by the defendant in support of the claim that the confession was not voluntary. (*People v. Rice* (1971) 16 Cal.App.3d 337, 343.) Aborting the fact-finding process with the conclusion that a promise of probation was "impossible" results in neither a fair hearing nor a reliable determination of voluntariness. It is one thing to find a witness generally not credible and quite another to refuse to consider appellants' evidence on the unwarranted assumption that it was "impossible" for Detective Foltz to have promised probation.

Third, there is a flaw in the trial court's reasoning that because it was "impossible" for Detective Foltz to have promised probation, the confessions were voluntary. Whether the confessions were coerced depends on whether Foltz made threats or promises that rendered the confessions involuntary.[3] The erroneous assumption that a promise of probation was "impossible" does not address the gist of the matter, which is whether

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[3] "Threats, express or implied, of certain conviction and heavy punishment, are usually accompanied by promises or suggestions of leniency or other advantage if a confession is given. Both methods of procurement render the confession inadmissible. [Citations.]" (1 Witkin, California Evidence (4th ed. 2000) Hearsay, § 65, p. 755.)

threats or promises, no matter how unfounded, were made. This assumption is just that—an assumption, and an incorrect assumption at that.[4]

A similar flaw exists with the trial court's finding that it was "incredible" that, as Greer-Warren testified, Greer-Warren was advised of his rights after he made a statement, although Jackson was advised of his rights before he made a statement. There was no evidentiary support for the court's belief that detectives would never change their "M.O." regarding when to give suspects their rights.

Given these flaws in the trial court's reasoning and findings, we reverse the counts for which the error was prejudicial, with directions to properly hear and determine the issue of voluntariness. We specifically disapprove as unfounded in fact or logic that it was "impossible" for Detective Foltz to have promised appellants probation in return for their confessions, or "incredible" that appellants were given their rights at different points in their interrogations. Our conclusion does not preclude the trial court from considering and determining whether promises of probation were actually made or whether the rights were given appropriately.

To determine which counts must be reversed, we apply this rule: "[W]henever a confession admitted in a California trial has been obtained by means that render the confession inadmissible under the federal Constitution, the prejudicial effect of the confession must be determined under the federal standard [of *Chapman v. California* (1966) 386 U.S. 18, 24]." (*People v. Cahill* (1993) 5 Cal.4th 478, 510.)

The confessions were the only evidence that linked appellants to the first incident, which involved Juvenal on the stairs (counts 1 & 2), as Juvenal did not identify appellants as the perpetrators. David, the victim of the third incident (counts 4 & 5), identified Jackson but not Greer-Warren, who was linked to that incident through his confession. We therefore find that the error in ruling on the confessions caused prejudice to both

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[4] The problem was recognized in appellants' initial briefing, which argues that the trial court rejected appellants' version of the interrogations based on its content, and not based on appellants' credibility, even though police officers are permitted to lie to suspects during interrogations.

Jackson and Greer-Warren on counts 1 and 2, but only to Greer-Warren on counts 4 and 5. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) That conclusion means we must reverse both appellants' convictions on the counts that involved Juvenal (counts 1 & 2), affirm Jackson's convictions on the counts that involved David (counts 4 & 5), and reverse Greer-Warren's convictions on counts 4 and 5.

For the second incident (count 3), the victim Fabian identified both appellants. Specifically, he testified at the trial that Jackson was the person who approached him with the gun, and Greer-Warren was the person who came out from the driver's seat of the Nissan, walked up to him, and "yanked" off his chain. The error in ruling on the confessions caused no prejudice on count 3 because the confessions were not necessary to link appellants to that count. We therefore affirm appellants' convictions on count 3.

To summarize: counts 1 and 2 are reversed as to both appellants. Count 3 is affirmed as to both appellants. Counts 4 and 5 are affirmed as to Jackson, and reversed as to Greer-Warren. The matter is remanded to the trial court, with directions to properly hear and determine the issue of the voluntariness of the confessions at an Evidence Code section 402 hearing.

"'[W]hen the validity of a conviction depends solely on an unresolved or improperly resolved factual issue which is distinct from issues submitted to the jury, such an issue can be determined at a separate post-judgment hearing and if at such hearing the issue is resolved in favor of the People, the conviction may stand.'" (6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Appeal, § 167, p. 414, quoting *People v. Vanbuskirk* (1976) 61 Cal.App.3d 395, 405.) Therefore, if the trial court determines on remand that the confessions were voluntary, the convictions on the reversed counts shall be reinstated, except for Greer-Warren's enhancement pursuant to Penal Code section 12022.53, subdivision (b) on count 1, for which there is a special problem that we will discuss, *post*, at page 21. The court shall then proceed with sentencing, in conformity with the discussion of the sentencing issues in the remainder of this opinion.

If the trial court determines on remand that the confessions were involuntary, the reversed counts shall be dismissed, the judgments shall be reinstated for both Jackson and

Greer-Warren on count 3 and for Jackson alone on counts 4 and 5, and the court shall proceed to resentencing, in conformity with the discussion of the sentencing issues in the remainder of this opinion.

3. The Sentencing Issues

A. Jackson's Sentencing Issues

i. The Record

Jackson's probation report showed that he had never been arrested before. He was raised by his paternal great-grandmother from the age of two until he was 17 years old, when he spent a year with his maternal grandmother. He resided with his great-grandmother and father at the time of the crimes. He had completed high school, was a student of the National Institute of Technology, hoped to become an electrician, and had just been hired to work at a market. The report named three circumstances in aggravation: violent conduct that showed a serious danger to society, crimes showing great violence or cruelty, and particularly vulnerable victims. Jackson's lack of prior criminal record was named as a circumstance in mitigation.

The prosecutor filed a sentencing memorandum that sought a 29-year prison sentence for Jackson. The following circumstances in aggravation were listed: great violence, threat of harm, or acts disclosing cruelty, viciousness or callousness; use of a weapon; particularly vulnerable victims; a taking of great monetary value; and a pattern of violent conduct. As a circumstance in mitigation, Jackson's lack of prior criminal record was named.

At Jackson's sentencing hearing, the court said it had read a letter that Jackson had written. Jackson personally addressed the court and requested leniency. Defense counsel also asked for mercy. He stressed that Jackson was very young, had done well in school and was attending trade school, despite a difficult childhood. Counsel further pointed out that, except for the one night when the crimes occurred, Jackson had committed no other crimes. Counsel recognized that the crimes deserved a "fairly lengthy" sentence, but argued that the 29 years the prosecutor sought was excessive.

The trial court then imposed a total prison sentence of 29 years four months. For the base term, it used count 5, assault with a semiautomatic firearm on David. (Pen. Code, § 245, subd. (b).)[5] That crime carries a penalty of three, six, or nine years. The court selected the upper term of nine years. Count 5 also had a finding of personal use of a firearm (§ 12022.5), which carries a penalty of three, four, or 10 years. The court selected the upper term for the enhancement. It therefore imposed a 19-year sentence on count 5. It then imposed consecutive sentence on most of the remaining counts, in this manner: for count 1, the second degree robbery of Juvenal, the court imposed one year (one-third of the midterm of three years), plus four months (one-third of the midterm) for an enhancement that a principal was armed with a firearm (§ 12022, subd. (a)(1)), plus four months (one-third of the midterm) for personal use of a deadly weapon, a knife (§ 12022, subd. (b)(1)).

Count 2, assault with a deadly weapon on Juvenal (§ 245, subd. (a)(1)), was stayed pursuant to section 654.

For count 3, the second degree robbery of Fabian, the court imposed consecutive sentences of one year for the offense and three years four months (one-third of 10 years) for personal use of a firearm (§ 12022.53, subd. (b)).

For count 4, the attempted second degree robbery of David, the court added eight months for the offense and three years four months for the section 12022.53, subdivision (b) enhancement.

In stating the reasons for its sentencing choices, the court named multiple victims as its reason for imposing (a) the upper term for both the offense and the enhancement in count 5, and (b) consecutive sentences on the counts. We quote its statement of reasons below.[6]

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[5] Subsequent statutory references are to the Penal Code unless otherwise noted.

[6] "THE COURT: The first analysis I do with these types of cases is the factors in [California Rules of Court, rule] 4.425, criteria effecting concurrent or consecutive sentencing.

"In this particular case, the crimes and their objectives were independent of each other, the first guy was rolled, if I may use the term, and they were the brothers and this third culprit were unsatisfied [*sic*] so they went after another guy that they rolled and robbed. And they still were unsatisfied with the amount of money they got. They went to, I suppose, a richer area or perceived to be a richer area during the latter part of the two hours that you talked about, Mr. Bunnett [defense counsel], and decided to go and rob somebody else.

"Ironically, the guy tried to ask for rescue which happens to be one of the guys in the car that happened to be the getaway car. How ironic can that be? And he got whacked in the head.

"The crimes are separate acts of violence or threats of violence. They are independent of each other. They were committed at different times, different places. Under [California Rules of Court, rule] 4.425, the consecutive sentencing is appropriate in this case.

"Let me explain to you, there is a flux in the law right now, or at least the application of the law. I don't think there is flux, but there is a flux on whether we apply the result of SB-40 or we apply the *Cunningham* factor that *Cunningham* sometime apply, [*sic*] and SB-40 doesn't apply. [(*Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*).)] But it really doesn't make a difference to me as I take at look at the bad characteristics in this case. And the court exercises its discretion under SB-40 in order to apply the aggravating factors.

"*The one that sticks out in my mind is multiple victims.* There are multiple victims in this case. And that is independently found by the jury as well through its finding by its verdict. And that is so overwhelming, so overriding as to any good factors. And I'm thinking about it, there's no remorse in this case. I know that because the two brothers said that they didn't mean, and particularly Mr. Jackson in this case took the stand and said he didn't mean what he said in his remorse letter because you were coerced.

"And I hope he doesn't accuse me of forcing him to write this letter that is three-and-a-half pages about his background because he seems to shift blame. I don't see any remorse.

"Insofar as background, it really doesn't go to his favor. And I'll explain to you why. If he has been doing so well for the last 19 years, getting honor rolls, doing a great job in school, [in] spite of all the adversities, and attending college, it speaks volumes that he decided to commit crimes. In fact, I think that the fact that he chose to commit crimes took -- and he's dumber than a doorknob.

"I can understand that he's not very sophisticated, but the fact that an honor role [*sic*] student in high school and proceeding towards college to[o] then does this, in this court's opinion, it doesn't bode well for him. He contemplated and thought about it and

ii. Analysis

The trial court cited the same factor in aggravation, multiple victims, for the upper term for the crime in count 5, for the enhancement in count 5, and for imposing multiple sentences. Jackson contends that the same fact could not have been used for all of those purposes. The contention has merit.

A trial court may base consecutive sentences on the facts that the crimes were independent of each other or were committed at different times or separate places. It may not, however, use the same circumstance in aggravation both to impose the upper term and a consecutive sentence. (Cal. Rules of Court, rule 4.425; see also § 1170, subd. (b); *People v. Deloach* (1989) 207 Cal.App.3d 323, 339.)

In *People v. Calhoun* (2007) 40 Cal.4th 398, 408, the court explicitly stated: "There is no persuasive reason why the trial court should not be allowed to consider the fact of multiple victims as a basis for imposing either the upper term or a consecutive sentence, although it cannot do both." Here, the fact of multiple victims was improperly used for both purposes.

Moreover, as pointed out in Jackson's reply brief, the trial court did not recognize that separate sentencing decisions were involved in imposing the upper term for the robbery and for the enhancement in count 5. Under *People v. Hall* (1994) 8 Cal.4th 950, 962-963, the full range of mitigating and aggravating circumstances is available when a trial court considers an enhancement that carries three possible terms. In *Hall*, however, the trial court used one aggravating factor to impose the upper term for the offense of robbery, and a different factor as the basis for the upper term on the robbery count's

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has done these kinds of bad things, and I don't see any mitigating factor or good factors. The bad factors are so overwhelming in this case, are so substantial in comparison to any factors that I would consider that are good factors.

"But in the court's exercise of its discretion under SB-40, assuming that's the analysis, I likewise indicate for the greater term of the base term. *The basis for that will be because there are multiple victims in this case.* That being the case, the court has spoken as to both its analysis with respect to either SB-40 or the *Cunningham* factors . . . ." (Italics added.)

firearm enhancement. Here, the trial court said it was utilizing the same factor, multiple victims, as a basis for the upper term, without distinguishing between the upper term for the offense and the upper term for the enhancement. (*See People v. Brown* (2000) 83 Cal.App.4th 1037, 1042-1046 [trial court properly imposed the lower term for the offense of attempted voluntary manslaughter, as the defendant had no prior criminal record, and the upper term of 10 years for a § 12022.5, subd. (a)(1) enhancement, as the defendant inflicted great bodily injury by repeatedly shooting the victim].)

Another error in the trial court's statement of reasons is that it utilized Jackson's lack of criminal record as an aggravating factor, when that fact should have been used as a mitigating factor. (Cal. Rules of Court, rule 4.423(b)(1).)

Respondent argues that the errors regarding the upper term were harmless, as the prosecutor's sentencing memorandum listed factors in aggravation that the trial court could have utilized. We disagree. There is a general rule that, if a trial court gives both proper and improper reasons for a sentence choice, the sentence will be set aside on appeal only if it is reasonably probable that the trial court would have chosen a lesser sentence if it had known that some of its reasons were improper. (*People v. Price* (1991) 1 Cal.4th 324, 492.) Here, however, the trial court named only one reason for its sentence choice, multiple victims. That fact could properly be used as a basis for imposing consecutive sentences (*People v. Calhoun, supra*, 40 Cal.4th at p. 408), but it could not then be used for the upper term and enhancement on count 5. Most of the circumstances in aggravation named in the prosecutor's memoranda could not properly have been used, as they duplicated facts that were imposed as enhancements (Cal. Rules of Court, rule 4.420(c)) or involved facts that were not found true by the jury (see *Cunningham, supra*, 549 U.S. 270). Moreover, Jackson's complete lack of prior criminal history was a circumstance in mitigation that was entitled to significant weight.

Jackson also maintains, and respondent agrees, that there are two problems with the sentence imposed on count 4, attempted second degree robbery. The first problem is that the judge imposed a consecutive sentence of eight months for the offense, but the judgment incorrectly shows one year. The second problem is that imposition of sentence

for both the attempted second degree robbery of David (count 4) and assault with a semiautomatic firearm on David (count 5) violates section 654's prohibition against multiple punishment.

At Jackson's resentencing hearing, the court shall avoid the mistakes made at the sentencing hearing and properly utilize the mitigating factor of Jackson's lack of prior record.

B. Greer-Warren's Sentencing Issues

i. The Record

According to the probation report, Greer-Warren had one prior arrest, which was for several Vehicle Code violations. That arrest led to a misdemeanor conviction for giving false information to a peace officer (Veh. Code, § 31), for which the penalty was a fine of $150 and three years of summary probation. The probation report further indicated that Greer-Warren was removed from his mother's care when he was two years old because his mother used drugs. He was in foster care until he was 15 or 16 years old, at which time he was returned to his mother. At the time of the crime, he was living with friends, attending the National Institute of Technology, and hoping to attain certification in several trades.

The prosecutor's sentencing memorandum sought a sentence of 19 years eight months for Greer-Warren. His insignificant record of criminal conduct was cited as a circumstance in mitigation. The prosecutor named the following circumstances in aggravation: the crime involved the threat of great harm or a high degree of cruelty; the defendant was armed with a firearm; the victim was particularly vulnerable; the crime involved a taking or attempted taking or property of great value; the defendant engaged in a pattern of conduct, which indicated a serious danger to society; the defendant was on probation when the crime was committed; and the defendant's prior performance on probation was unsatisfactory.

Greer-Warren's sentencing hearing occurred on a date later than Jackson's. Greer-Warren's counsel said he did not personally believe the case was worth more than 13 years. The People had offered that sentence in a plea bargain, but Greer-Warren chose

to go to trial. Counsel knew the judge planned to impose more time than that. The prosecutor submitted.

The trial court then imposed a total prison sentence of 19 years eight months on Greer-Warren. It used count 1, the second degree robbery of Juvenal, as the base term. It selected the upper term of five years for that offense, plus 10 years for a section 12022.53, subdivision (b) firearms use enhancement. Count 2, assault with a deadly weapon on Juvenal (§ 245, subd. (a)(1)), was stayed pursuant to section 654. Consecutive sentences were imposed on the remaining counts, in this manner: On count 3, the second degree robbery of Fabian, the court gave one year for the offense plus four months (one-third of one year) for arming with a firearm (§ 12022, subd. (a)(1)). For count 4, the attempted second degree robbery of David, the court gave eight months for the offense (one-third of the midterm), plus four months for arming with a firearm (§ 1022, subd. (a)(1)). On count 5, assault with a semiautomatic firearm on David (§ 245, subd. (b)), the court gave two years (one-third of the midterm) for the offense, plus four months for arming with a firearm (§ 12022, subd. (a)(1)).

As it had done with Jackson, the trial court named "multiple victims" as the sole circumstance in aggravation for its sentencing choices. We quote its statement of reasons below.[7]

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[7] "THE COURT: [¶] . . . [¶] First, with respect to concurrent versus consecutive sentencing, these crimes occurred at different time frames during the evening at three different locations and, in fact, involv[ed] different people using the same gun to commit the robbery. And they are discrete events as far as this court is concerned, just consecutive sentencing.

"Insofar [as] whether or not this court should apply the maximum sentence or highest term allowed by law under SB-40, which is now the Booker law, we have '*Bookerized*' the sentencing.

"This court realizes there were multiple victims in this case, which is a significant aggravating or bad factor justifying imposing the maximum term allowed by law."

ii. Analysis

One of Greer-Warren's sentencing issues applies only to him. He attacks the 10-year firearms enhancement under section 12022.53, subdivision (b) that was added to count 1. The record shows that there was an inconsistency between the jury finding and the allegation for that enhancement. The allegation was that Greer-Warren personally used a firearm pursuant to section 12022.53, subdivision (b). The finding was that a principal was armed with a handgun pursuant to section 12022, subdivision (a)(1). Respondent agrees with Greer-Warren that the sentence on count 1 must comply with the jury's finding. Upon remand, Greer-Warren can be charged on count 1 with an enhancement under section 12022, subdivision (a)(1) but not under section 12022.53, subdivision (b), as his punishment cannot be increased on retrial after reversal. (6 Witkin & Epstein, Cal. Criminal Law, *supra,* § 166, p. 412.)

As with Jackson, Greer-Warren contends, and respondent concedes, that simultaneous imposition of sentence on counts 4 and 5 violates section 654's prohibition against multiple punishments.

The sentencing issue that respondent does not concede for Greer-Warren involves the use of the multiple victims factor both to (a) impose consecutive sentences on the counts that were not stayed pursuant to section 654; and (b) impose the upper term on the base term, which in Greer-Warren's case was count 1. As with Jackson, dual use of the same fact was erroneous, but respondent argues that the error was harmless, as the prosecutor's sentencing memorandum named many other potential factors in aggravation. The problem with that argument, as we already discussed, is that multiple victims is the fact the trial court relied on when it imposed sentence, many of the factors in aggravation named by the prosecutor required a jury finding that was not made, and Greer-Warren's insignificant prior record was a strong factor in mitigation.

Upon resentencing, the court shall avoid the errors we have discussed that occurred at Greer-Warren's original sentencing hearing.

4. Assignment of a Different Trial Judge

Based on some of the statements by the trial court at the Evidence Code section 402 hearing and at the sentencing hearing, "it is possible the appearance of impartiality may have been compromised. In the interests of justice, we therefore order that [all further proceedings on remand] be heard by a different trial judge. (Code Civ. Proc., § 170.1, subd. (c).)" (*Rose v. Superior Court* (2000) 81 Cal.App.4th 564, 576.)

DISPOSITION

Affirmed in part, reversed in part, and remanded in accordance with the views expressed herein.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

FLIER, J.

I concur:

COOPER, P. J.

BIGELOW, J., Dissenting:

I respectfully dissent from parts 2, 3, and 4 of the majority opinion. Contrary to the conclusions reached by the majority, the grounds relied upon for reversal have been forfeited, and the contentions are without merit.

Voluntariness of the Confessions

Without addressing the merits of the issue raised on appeal by defendants – that their confessions were involuntary – the majority instead has determined that the trial court "had a preconceived belief" that a police officer would never promise probation to a suspect in a crime involving the use of a firearm, and that that belief rendered the hearing fundamentally unfair. In other words, the majority finds that the trial court prejudged the issue of the voluntariness of the defendants' confessions. I disagree.

First, neither Jackson nor Greer-Warren objected at trial on this basis. Thus, the issue has been forfeited for purposed of appeal. Even a constitutional violation must first be raised in the trial court in order to preserve the claim for appellate review. (*People v. Boyette* (2002) 29 Cal.4th 381, 424.) Indeed, not only did defendants fail to raise the issue of the trial court's purported preconceived beliefs below, they did not mention it in their briefs before this court.[1] Their failure to press the issue until this court requested supplemental briefing strongly suggests, as I conclude, that the claim lacks merit on a fair reading of the record.

In my view, under established law the majority clearly errs in finding reversible error in the trial court's comments. The court did no more than explain why, as a factual matter, it concluded defendants' confessions were voluntary. Under both state and federal law, courts apply a "totality of circumstances" test to determine the voluntariness of a confession. (*People v. Massie* (1998) 19 Cal.4th 550, 576.) Among the factors to be

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1 There is one passing comment in the brief by Greer-Warren, who expressed the opinion the trial court was "remarkably naïve" in believing a detective would not promise probation when he could not do so legally. Other than this unwarranted attack on the trial court, Greer-Warren at no time makes the argument relied upon by the majority as a basis for reversal.

considered are the presence or absence of police coercion, the length of the interrogation, its location, its continuity, the defendant's maturity, education, physical condition, and mental health. (*Ibid*.) On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld where supported by substantial evidence, but the trial court's ultimate decision as to the voluntariness of the confession is subject to independent review. (*Ibid*.)

The trial court's finding that no coercion existed is supported by substantial evidence and should be affirmed. The trial court expressly stated that it believed the officers' testimony that they did not promise probation, and did not believe the defendants' testimony to the contrary. Given that predicate, I would find the defendants' confessions were voluntary.

The trial court's comments do not approach a showing that the court prejudged the credibility of the interrogating officers. The reporter's transcript shows only the trial court's assessment that it believed the officers' testimony that they did not promise probation, and conversely, that it did not believe the defendants' testimony that they were promised probation. The trial court's comments were no more than an extemporaneous expression of the court's ongoing thought processes, and do not demonstrate a preconceived belief about what a police officer would or would not say during a particular interrogation.

The trial court's assessment of the witnesses' credibility — or, in other words, the trial court's finding that no promises of probation were made — should be the beginning and end of the issue whether defendants' confessions were *admissible* at trial. (See generally, *People v. Williams* (1997) 16 Cal.4th 635, 659 [when a defendant challenges a confession as involuntary, it "may not be introduced into evidence at trial unless the prosecution proves by a preponderance of the evidence that it was voluntary"].) In the current case, the trial court made the proper determination for admissibility, and defendants were thereafter given (and exercised) a full opportunity to attack the *credibility* of that evidence at trial. I would affirm because I see no error in admitting defendants' confessions.

Sentencing

I also disagree with the majority's analysis in part 3 that the trial court prejudicially erred in its statement of reasons at sentencing. As to Jackson, the majority concludes the trial court erred by using the same "fact" to impose the upper term as to the base term and the enhancement in count 5 as well as for imposing consecutive sentences.

Preliminarily, I do not agree with the majority's conclusion that the trial court must find facts to support its sentencing decisions. Recently enacted Senate Bill 40 (SB 40) (Stats. 2007, ch. 3) applied to this sentencing. The California Legislature passed SB 40 as an urgency measure on March 30, 2007, and the sentencing took place on June 6, 2007. The trial court specifically indicated it was sentencing pursuant to that statue. The watershed change set forth in SB 40 was that a sentencing court *no longer finds facts* when making a sentencing decision, *but instead states reasons* for its sentencing choices. This alteration was made to ensure that a trial judge was exercising its discretion to select a sentence within a defined range – instead of finding a fact which would require a jury determination – thereby squarely removing the Sixth Amendment violation found in California's Determinate Sentencing Law by the United States Supreme Court in *Cunningham v. California* (2007) 549 U.S. 270. I disagree with the majority's reference to trial court's finding *facts*, as the trial court here instead properly stated *reasons* for its sentencing choice.[2]

It is true that a trial court must state separate reasons for imposition of the upper term on the base count and on an enhancement (*People v. Scott* (1994) 9 Cal.4th 331,

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[2] Further, given that the trial court no longer finds facts in support of its sentencing choice, there is a question as to whether the prohibition on *dual use of facts* embodied in California Rules of Court, rule 4.420, subdivisions (c) and (d) is still controlling authority. (See, e.g., Advisory Com. com., 23 pt. 1B West's Ann. Ct. Rules (2008 pocket pt.) foll. rule 4.420, p. 25.) Because this issue was not raised by either party, however, I will not address it further here.

350; Cal. Rules of Court, rule 4.420(c)) and separate reasons for imposing a consecutive sentence from those used for an upper term of imprisonment. (*People v. Avalos* (1984) 37 Cal.3d 216, 233.) Once again, however, there was no objection made in the trial court to this alleged error. In *People v. Gonzalez* (2003) 31 Cal.4th 745, 755-756, our Supreme Court applied the forfeiture doctrine in the context of a dual use argument and declined to consider the defendant's claim that the trial court improperly relied on the defendants' use of firearms "in two different aspects of their sentences." Under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, I believe we are bound to follow that precedent and find the argument forfeited.

But even had the claim been preserved for appellate review, the trial court clearly set forth separate reasons for imposition of the upper term and consecutive sentencing. When deciding to impose consecutive sentencing, the trial court explicitly stated that the crimes were "independent of each other," and "separate acts of violence or threats of violence . . . committed at different times, [and] different places, under 4.425 . . ." Before it imposed the upper term for the base term and the enhancement on count 5, the trial court stated a multiple circumstances in aggravation, including that Jackson showed no remorse, contemplated the crimes, and committed attacks on multiple victims. The trial court said it found ". . . so overwhelming, as overriding as to any good factors" that the attacks were committed on multiple victims. The court's comments constitute a sufficient statement of reasons justifying the sentencing choices made. In any event, given the trial court's statements about how overwhelming it considered the fact of multiple victims, any error was not prejudicial. (See, *People v. Champion* (1995) 9 Cal.4th 879, 934, disapproved on other grounds in *People v. Combs* (2004) 34 Cal.4th 821, 860.)

Finally, I do not read the trial court's statement of reasons as the majority does. The court did not use Jackson's "lack of a criminal record as an aggravating factor." The trial court said the following about Jackson's background:

> "Insofar as background, it really doesn't go to his favor. And I'll explain to you why. If he has been doing so well for the last 19 years,

> getting honor rolls, doing a great job in school, [in] spite of all the adversities, and attending college, it speaks volumes that he decided to commit crimes. In fact, I think that the fact that he chose to commit crimes took – and he's dumber than a doorknob.
>
> I can understand that he's not very sophisticated, but the fact that an honor role [*sic*] student in high school and proceeding towards college to[o] then does this, in the Court's opinion, it doesn't bode well for him. He contemplated and thought about it and has done these kinds of bad things, and I don't see any mitigating factor or good factors."

These statements indicate the trial court dismissed Jackson's lack of a criminal record as a mitigating factor justifying a lesser sentence, not that the court used the lack of a criminal background as an aggravating factor. The trial court thought Jackson was smart, educated, and on the road to success, yet he foolishly made a conscious and planned decision to commit these crimes. In short, the trial court made a common sense assessment, supported by substantial evidence, that Jackson's crimes were planned, a statutory circumstance in aggravation. (Cal. Rules of Court, rule 4.421(a)(8).) The majority cites no authority, and none exists, which requires trial courts to mechanistically reiterate verbatim the statutorily listed circumstances in aggravation. I do not believe we are directed on appeal to so critically construe a trial court's unrehearsed statements at sentencing in the manner the majority does.

As to Greer-Warren, the only sentencing issue with which I depart from the majority is the finding that the trial court improperly used multiple victims as the sole circumstance in aggravation. Once again, the record reveals there was no objection at the trial court level to preserve this issue for appeal. (*People v. Gonzalez, supra,* 31 Cal.4th at pp. 755-756.) But even had there been such an objection, I would not find error. The court stated it was imposing consecutive sentences because the events occurred "at difference time frames during the evening at three different locations and, in fact involve[d] different people using the same gun to commit the robbery." It then imposed the upper term because there were multiple victims. In my view, the trial court's statements indicated it thought that Greer-Warren spent the evening in a crime spree that

involved great threats of harm and a high degree of cruelty as well as multiple victims, a separate circumstances in aggravation. (Cal. Rules of Court, rule 4.421(a)(1).)

Finally, the majority finds reversible error because the other factors in aggravation that were set forth by the prosecutor "required a jury finding that was not made." I do not understand this part of the majority opinion. Because this sentencing occurred after the passage of SB 40, and the trial court expressly recognized and relied on that statute, it was stating reasons for its sentencing choices, not finding facts that require a jury determination.

Assignment of a Different Trial Judge

I strongly disagree with the majority's decision to assign a different trial judge to this case upon remand. As my comments indicate, I believe the trial judge ruled appropriately. He certainly did nothing to warrant his removal from this case for a lack of impartiality. The practical effect of the decision in this case is to discourage trial judges from explaining their thought process for fear that the court of appeal will misconstrue their comments, find reversible error where none exists, and then remove them from the case on remand. I cannot concur in such a judgment.

BIGELOW, J.